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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FILIPE LEIATATUA VAVE, Defendant and Appellant.	E048790 (Super.Ct.No. RIF145561) OPINION

APPEAL from the Superior Court of Riverside County. Kenneth L. Hake, Judge. (Retired judge of the Sacramento Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Filipe Leiatatua Vave appeals his jury conviction for assault with a deadly weapon (a knife) by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)),[1] and corporal injury to a cohabitant with personal use of a deadly weapon (§§ 273.5, subd. (a), 12022, subd. (b)(1), 1192.7, subd. (c)(23)). He claims the court's instructions to the jury on the reasonable doubt standard of proof were constitutionally inadequate. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case was defendant's live-in girlfriend. The events leading to the charges against defendant occurred on August 27, 2008, inside an apartment defendant shared with the victim, the victim's mother, and the victim's young son, Matthew, who was ill and bedridden. At trial, the prosecution offered testimony by the victim, her mother, and two investigating police officers. The defense theory of the case was that defendant did not act willfully. In closing arguments, defense counsel said: "Now, as you probably hopefully all know by now, there is only one element that the defense is really contesting. . . ." "In the stress of the situation he lost consciousness. . . . [H]e didn't act willfully because he was unaware of what he was doing."

The victim's mother testified she and Matthew were in the same room with defendant and the victim, when defendant and the victim began arguing. The victim's mother turned around when she heard the victim scream, and she saw defendant hitting the victim with a crutch. While defendant was hitting the victim, part of the crutch broke

[1] All further statutory references are to the Penal Code unless otherwise stated.

off. She grabbed defendant's arm and hair to try to get him to stop. He dropped the crutch and moved away. She noticed blood running from the victim's head and grabbed her to keep her from slumping over.

Defendant went into the kitchen, about 10 or 15 feet away, and came back with a knife in his hand. He shoved the victim's mother out of the way and tried to stab the victim. The victim grabbed the knife with her hand to try to stop him. He raised it to try again. The victim's mother recalled seeing the knife about three inches from her daughter's chest, and she screamed to defendant, "Matthew needs her." Defendant dropped the knife.

After dropping the knife, defendant grabbed the victim, put her on a nearby bed, and started wiping the blood off of her face. The victim's mother started to call for an ambulance. Defendant started walking toward her and said, "Why the f--- would you call the police on me?" Afraid, she stopped the call and begged defendant to let her take the victim to the hospital. However, the victim did not want to leave without her son, so defendant agreed to put him in the car.

A deputy sheriff testified he was dispatched to the hospital, where he first spoke separately with the victim and then the victim's mother. In the hospital interview, the victim's statement to the deputy about the incident was similar to and highly consistent with the testimony by the victim's mother at trial. She said she thought defendant was going to kill her with the knife. She also recalled defendant attempting to strangle her with his left hand so that "her breathing became restricted and she felt as though she was going to blackout. . . ." The deputy identified photographs of the victim's injuries, and

the injuries were highly consistent with what she told the deputy about the incident. When asked about prior incidents of domestic violence, the victim told the deputy "she was physically abused by [defendant] once a week over a two-month period."

At trial, the victim's testimony was inconsistent with what she told the deputy at the hospital. She recalled arguing with defendant and "getting hit." However, she said, "Anything after the first hit I don't remember." She could not say what defendant used to hit her. She later said, "I do remember being hit twice." She denied telling the deputy that defendant struck her with a cane, tried to stab her with a knife, and choked her neck. Nor did she remember any other physical altercations. On the other hand, she did have some recollections that appeared to be an effort to help the defense. She said she looked at defendant during the incident and realized "he wasn't all there. He wasn't hearing anything that was being said." She saw "blankness," and she had never seen him like this before. In addition, she claimed her mother told her what to say when she was questioned by police. Conversely, the victim's mother denied telling her daughter what to say to police.

A second deputy testified he was dispatched to the apartment. He saw defendant in the stairwell. The deputy asked to speak to him, and he said, "no," so the deputy asked him why. He said "he didn't want to get arrested." When the deputy asked him why he would get arrested, he replied, "I just beat up my girlfriend." The deputy noticed something silver in defendant's pocket, so he asked him if he had any weapons. Defendant admitted he had a knife in his pocket, and as the deputy continued to talk to him, defendant decided to drop the knife.

Defendant was taken into custody and agreed to talk to the deputy in an interview room. He told the deputy he hit the victim with a metal cane and the cane broke, so he got a knife from the kitchen, swung it at her face, and cut her forehead. He realized what he was doing when he saw blood. He then let the victim's mother take her to the hospital. A portion of the tape recorded interview was played for the jury.

Defendant testified in his own defense. He claimed he had no recollection of hurting the victim. Rather, he recalled arguing with her, and the next thing he remembered she was bleeding. He claimed he told the deputy that he harmed the victim based on statements made to him by the victim's mother after the incident.

The jury found defendant guilty of assault with a deadly weapon (a knife) by means likely to produce great bodily injury (§ 245, subd. (a)(1)) and corporal injury to a cohabitant (§ 273.5, subd. (a)). The jury also found true the allegation that defendant personally used a knife to commit the corporal injury offense. (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).) The court suspended the proceedings and granted defendant probation for a period of three years subject to various terms and conditions.

DISCUSSION

To explain the reasonable doubt standard, the trial court instructed the jury with CALCRIM No. 220.[2] Defendant contends the instruction is not constitutionally

[2] CALCRIM No. 220 as given to the jury states as follows: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty

[footnote continued on next page]

adequate, because it does not tell the jury it must find "each element" of the charged offenses beyond a reasonable doubt. He also believes the term "something" is too vague. As a result, he argues the prosecution was relieved of its burden of proving guilt beyond a reasonable doubt, so his conviction should be reversed.

"Under the United States Constitution and California law, the government must prove each element of a charged offense beyond a reasonable doubt. [Citations.] Whether an instruction correctly conveys this standard must be determined by examining the instruction in the context of all the instructions given the jury. [Citations.]" (*People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601 (*Wyatt*).) "The standard of review in an appellate challenge to an instruction on the ground of ambiguity is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness." (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157.)

As defendant concedes in his opening brief, at least two appellate courts have rejected similar arguments in published cases. (*People v. Henning* (2009) 178 Cal.App.4th 388, 405-406 (*Henning*); *Wyatt, supra,* 165 Cal.App.4th at pp. 1600-1601.) The constitutionality of CALCRIM No. 220 has been repeatedly attacked on various

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beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

grounds but consistently affirmed by numerous courts. (See, e.g., *People v. Zavala* (2008) 168 Cal.App.4th 772, 781; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 29-32; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092-1093; *People v. Anderson* (2007) 152 Cal.App.4th 919, 944; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1508-1510; *People v. Hernandez Rios, supra,* 151 Cal.App.4th at pp. 1156-1157.)

Defendant's main arguments are that the above-cited cases and other similar cases were wrongly decided and/or that the *Wyatt* and *Henning* decisions are distinguishable because the juries in those cases were given other instructions containing the "each element" language.[3] We simply disagree. Based on the record before us, *Henning* and *Wyatt* are not materially distinguishable. Here, as in these cases, the "each element" language was not necessary for the jury to understand the prosecution's burden of proof. In addition to CALCRIM NO. 220, the court separately instructed the jury on the elements of each of the charged offenses. The attorneys' closing arguments focused on the reasonable doubt standard and the elements of the offenses. In fact, defense counsel's closing argument placed considerable emphasis on the reasonable doubt standard. Defense counsel's closing argument also highlighted the willfulness element, i.e., the

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[3] For example, in *Henning, supra,* 178 Cal.App.4th at pages 406-407, the jury was given CALCRIM No. 361, which concerns a defendant's failure to explain or deny adverse evidence. Before it was revised in April 2010, CALCRIM No. 361 read, in part, as follows: "The people must still prove *each element* of the crime beyond a reasonable doubt." (Italics added.) In April 2010, CALCRIM No. 361 was revised, and the "each element" language was omitted.

"one element that the defense [was] really contesting. . . ." Defendant even testified in an attempt to negate this particular element. However, the record indicates the prosecutor was able to convincingly attack the defense theory during cross-examination of defendant and closing arguments. Under these circumstances, we can detect no possibility the jury misinterpreted or misapplied the relevant standard. Rather, it is apparent the jury was simply not persuaded by the defense theory of the case. The evidence against defendant was highly consistent and overwhelming.

We also reject defendant's contention that the use of the word "something" in the instruction is vague. Its meaning is clear when read in context. It obviously refers to all of the elements or components of the charged offenses as set forth by the court on the record.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.